No. 90-905

In The

Supreme Court of the United States

October Term, 1990

HAROLD FRIEDMAN
and
ANTHONY HUGHES,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

1. Was the indictment, brought pursuant to 29 U.S.C. §501(c), and charging that no work had been performed by union employees in consideration of salaries paid, constructively amended by proof at trial that work had been performed and further, should the conviction be reversed because of the Government's failure to prove lack of benefit to the union, an essential element of the statute?

2. Should Counts I and II be overturned because they were obtained under a statute that is unconstitutionally vague both on its face and as applied to the defendants?

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OPINIONS BELOW

On July 26, 1990, the United States Court of Appeals for the Sixth Circuit affirmed *per curiam* the convictions of petitioners Harold Friedman and Anthony Hughes. That decision has not been reported but is reproduced in the Appendix at pages A3 through A4. The orders and decisions of the United States District Court for the Northern District of Ohio, Eastern Division, are also contained within the Appendix filed simultaneously with this Petition.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals affirming the convictions was entered on July 26, 1990. Friedman and Hughes' petition for rehearing with a suggestion for rehearing en banc, filed pursuant to Federal Rules of Appellate Procedure 40 and 35(b) was denied in an order entered by the Sixth Circuit on September 10, 1990. Jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1254(1) and Rule 13.4 of the Rules of this Court. Federal jurisdiction in the District Court is invoked under 18 U.S.C. §3231.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 5

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of

life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statutory provisions 29 U.S.C. §501(a), (b) and (c) and 18 U.S.C. §1961 and §1962 are reprinted in the Appendix to this Petition.

STATEMENT OF THE CASE

The Indictment in this case, filed on May 16, 1986, charged that Jackie Presser, Harold Friedman and Anthony Hughes, as Officers of Local 507 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Harold Friedman and Anthony Hughes, as President and Business Agent, respectively, of Local 19 of the Bakery, Confectionery and Tobacco Workers International Union, AFL-CIO, had violated 18 U.S.C. Sections 2, 1961 and 1962 and 29 U.S.C. Section 501(c). The Indictment enumerated seven (7) counts, the first an allegation that Presser, Friedman and Hughes, together with Locals 507 and 19, constituted an enterprise, the activities of which affected interstate commerce, and had participated in the conduct of the affairs of the enterprise through a pattern of racketeering activity "involving multiple acts of embezzlement, stealing, abstraction and conversion to their own use, and the use of another, funds of Local 507 and Local 19" in violation of 29 U.S.C. Section 501(c). The pattern of racketeering alleged enumerated twenty-six (26) predicate acts which charged, in essence, that Presser and Friedman had paid an annual salary to John Nardi, from 1972 through December 31, 1978, "knowing full well that Jack Nardi failed to perform work on behalf of Local 507." The same allegation was made with regard to the salary paid by Local 507 to Allen Friedman from 1973 through May 16, 1981, and George Argie from August, 1978 through June, 1979. Harold Friedman, as President of Local 19, was further charged with paying Anthony

Hughes, from 1977-1981, a salary as a business agent when he allegedly was not performing the duties of that position.

Count II of the Indictment reasserted the allegations of Count I, charging Presser, Friedman and Hughes with conspiring to violate 18 U.S.C. Section 1962(c). Counts III and IV asserted an additional violation of 29 U.S.C. Section 501(c) and 18 U.S.C. Section 2, realleging acts of embezzlement by Presser and Harold Friedman with respect to the salary payment of Allen Friedman from May 16, 1981 through September 8, 1981 (Count III), and alleged acts of embezzlement by Harold Friedman and Hughes regarding the salary paid Hughes from May 16, 1981 through December 31, 1981 (Count IV).

Count V alleged that Friedman and Presser had falsely reported, on a 1981 labor organization annual report, Form LM-2, filed with the Department of Labor by Local 507, that Allen Friedman had been salaried as an employee and business agent of the Union when the defendants knew that he was not performing the duties demanded by that position. The same allegation was made in Count VI regarding the LM-2 form filed by Harold Friedman for 1981 with respect to the salary of Anthony Hughes. Count VII related solely to Jackie Presser who died prior to trial.

The jury trial began on October 25, 1988 and ended January 10, 1989. On January 13, 1989, the jury returned its verdict finding Harold Friedman guilty on Counts I, II, IV and VI and not guilty on Counts III and V. Anthony Hughes was found guilty on Counts I, II and IV. The jury found Harold Friedman guilty of committing the predicate RICO violations which related to payment of Argie's salary from January through June, 1979 and Hughes' salary for 1978 and May through December, 1981. Hughes' conviction was based on the predicate acts relating to his 1978 salary and his May through December, 1981 salary.

Harold Friedman and Anthony Hughes were sentenced on May 26, 1989. Friedman was placed on a term of four years probation, fined a total of $35,000 and ordered to forfeit his positions as Officer and Trustee with Locals 507 and 19. Anthony Hughes also was placed on probation for four years, fined $30,000 and ordered to forfeit his positions with Locals 507 and 19. The Court granted a stay of sentencing pending appeal. On July 26, 1990, the Sixth Circuit Court of Appeals, in a *per curiam* opinion, affirmed the judgments of conviction.

The Government's case was presented through a number of witnesses, the majority of whom were owners of small businesses whose bakeries or groceries employed members of Locals 19 and 507. Many of these individuals testified that they did not know Jack Nardi, Allen Friedman, George Argie or Anthony Hughes and that none of these men had visited their businesses during the particular years charged in the Indictment. It was the Government's position, broadly stylized, that, since, as business agents, these men had not visited the shops, their salaries had not been earned, but rather, embezzled.

Given that focus, the question of what function a business agent performed became central to this case. The Government presented evidence, through the testimony of business agents such as Stephen Kapelka, James Wilkens and Willie Tunstall of the daily routine of some business agents — those employed "on the book."[1] Those business agents reported to the union hall at 7:00 a.m., met with Harold Friedman for their daily assignment and by 8:30 a.m. were on the road visiting union shops until 6:00 or 6:30 p.m. At each shop, the business agent was required to check on union membership, sign up new members, confirm that union dues had been paid and investigate any complaints made

[1] Stephen Kapelka testified that the term "on the book" business agent derived from the books which contained the routes and activities of the business agents and which they carried with them to the shops (Kapelka at TR 513).

regarding shop management (*see, e.g.*, Kapelka at TR 515).[2] At the end of the day's preplanned route, the business agents would return to the union hall, respond to phone calls and leave a report of their activities with Harold Friedman (Kapelka at TR 530).

However, not all business agents employed by Locals 19 and 507 had as their function "on the book" concerns. David Williams himself, who, as Special Agent in charge of the Cleveland Office of Racketeering, had investigated the activities of business agents for seven years (Williams at TR 354), testified that it was Harold Friedman's prerogative to designate a business agent to be employed inside the union hall, "as long as it involved some service to the union" (Williams at TR 378).[3]

Harold Friedman testified on his own behalf at trial and detailed his use of that prerogative. Friedman, the President of Locals 507 and 19,[4] explained that business agents were not only of two basic types, but also answered to different supervisors. Some of Local 507's business agents were assigned to Harold Friedman; others to Jackie Presser (Friedman at TR of 1/3/89 at 1874-1875). Those under Friedman's tutelage served two basic functions: those who visited the union shops and those whom Friedman retained in the office to help handle the constant flux of calls and visitors, numbering several hundred people on a daily basis (Friedman at TR of 1/3/89 at 1879). These inside agents were also utilized to attend the two or three negotiating sessions occur-

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[2] The trial minutes in this case were taken by two court reporters and the transcript page numbers are not completely sequential. In order to avoid confusion, references to Roy Thompson's minutes, taken from 1/3/89 through the end of trial, list both the date and transcript page.

[3] Indeed, the constitution and bylaws of the unions specify that, where the duties of a business agent are not prescribed by the bylaws, those employees are subject to the orders of the chief executive officer of the union.

[4] Friedman clarified that the chain of command varied from union to union. In Local 507, the President was the second in command, preceded by Secretary/Treasurer Jackie Presser (Friedman at TR of 1/3/89 at 1868).

ring in Friedman's office each day, to sit in on more informal meetings Friedman had with regard to union matters and to attend the variety of Pension Fund meetings and Health and Welfare Fund meetings held for both locals (TR of 1/3/89 at 1882-1885).

Stephen Kapelka, business agent for both locals from 1976 until 1980, corroborated Harold Friedman's testimony that certain agents worked inside the union hall (Kapelka at TR 583), as did business agent James Wilkens who recalled Red Oxyer as a BA who did not go outside to the shops (Wilkens at TR 720). Wilkens also testified that the term itself was a general job classification that carried with it no written job description and that certain union employees seemed to work solely for Jackie Presser and to take their direction from him (Wilkens at TR 732-738).

Of the four individuals named in the Indictment as having been improperly paid as salaried employees (Nardi, Argie, Allen Friedman and Hughes), John Nardi was the only one who testified that he performed no work at all for the union (Nardi at TR 907). Friedman was found not guilty of any charge relating to non-payment of Nardi.

George Argie testified that he had been hired directly by Jackie Presser to work at Local 507 during the year 1978-1979 (Argie at TR 1982, 2010). According to Argie, his job was to follow Presser's instructions (Argie at TR 1987). Argie testified that he reported to the union hall five days per week, for four hours each day (Argie at TR 1993). He met with Jackie Presser in Presser's office, and if Presser was not in, Argie stayed in the office and read (Argie at TR 1992). On other occasions, he attended out-of-town conferences with Presser (Argie at TR 1997, 1999), testifying that he traveled with Presser eight of the ten months he was with Local 507 (Argie at TR 2012).

Allen Friedman also testified for the Government, and no one questioned that he had been a vigorous worker and a talented union organizer since the early 1960's when he helped establish Local 507 (A. Friedman at TR 2250). However, in May, 1976, Friedman had a massive heart attack (A. Friedman at TR 2283), his doctor informing him that, unless he slowed his frenetic work pace, he had but 18 months to live (A. Friedman at TR 2285). The jury acquitted Harold Friedman on those counts relating to Allen Friedman's alleged failure to perform work for the union.

Anthony Hughes' history as a business agent differed from Allen Friedman's in that Hughes had never been the union organizer that Friedman was. Nevertheless, the political contacts and experience he had garnered while serving his tenure at the union acted, in their own way, as a boon to union interests. Although Hughes did not testify at trial, evidence of his contributions to the union emanated from government witnesses such as labor lawyer Robert Duvin, who labeled Hughes "very active politically" on the union's behalf (Duvin at TR 1852) and shop owners such as Nick Orlando, who considered Anthony Hughes to be far more approachable about union business than Harold Friedman (Orlando at TR 1693). Harold Friedman assented to this assessment of Hughes' talents. Thus, while Friedman did not send Hughes out to the shops, Hughes worked as a business agent inside the union hall; attending the negotiating sessions conducted by Friedman (Friedman at TR of 1/3/89 at 1903); and acting as a negotiator in his own right, settling differences and smoothing rifts between Friedman and assorted union employers (Friedman at TR of 1/3/89 at 1900).

REASONS FOR GRANTING THE WRIT

POINT I

THE INDICTMENT, BROUGHT PURSUANT TO 29 U.S.C. §501(c), AND CHARGING THAT NO WORK HAD BEEN PERFORMED BY UNION EMPLOYEES IN CONSIDERATION OF SALARIES PAID, WAS CONSTRUCTIVELY AMENDED BY PROOF AT TRIAL THAT WORK HAD BEEN PERFORMED AND FURTHER, THE CONVICTION SHOULD BE REVERSED BECAUSE OF THE GOVERNMENT'S FAILURE TO PROVE LACK OF BENEFIT TO THE UNION, AN ESSENTIAL ELEMENT OF THE STATUTE

The indictment in this case charged, *inter alia*, that Jackie Presser, Harold Friedman and Anthony Hughes had violated 29 U.S.C. §501(c)[5] by embezzling the funds of Local 507 of the Teamsters Union and Local 19 of the Bakers Union. The allegation was that the salaries of four individuals, during specified periods, had been paid but that the individuals reimbursed had "failed to perform work" on behalf of the union. The four alleged ghost employees were Jack Nardi, Allen Friedman, George Argie and Anthony Hughes. Each was said to have been paid as a union business agent while, the indictment alleged, they were not "performing the services and duties of a business agent."

In an attempt to ascertain the actual theory of prosecution, the defendants moved for a bill of particulars. The defense motion was opposed, the prosecution contending that its response to that

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[5] 29 U.S.C. §501(c) provides: "any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both."

motion contained the requested particulars. That prosecution response specified that the crime charged was that the defendants had paid the salaries of the named union employees when they, in fact, had done "no work" for the union. Based upon the prosecution's representation that the Government had sufficiently described the crime alleged in the indictment, the trial court denied the defense particularization motion.

Trial began in October, 1988, two-and-a-half years after the Government represented to the defendants that the crime of embezzlement was predicated upon the payment of salaries when *no work* had been performed. At trial, however, the Government deviated from its previously expressed theory of prosecution and, in opening statements, apprised the jury that it would prove that the alleged ghost employees had done "little or no" work for the union. That newly articulated theory of the case was reflected in the actual proof at trial, the Government's summation, and the Court's instructions to the jury which effectively removed the issue of amount of work, or benefit to the union, from the jury. The defense had specifically requested that the jury be instructed that the Government was responsible for proving that no work had been done. The defendants sought a reversal of the conviction because of the Government's alteration of its theory, arguing that such had constructively amended the indictment and that, as presented, the allegation did not constitute embezzlement under 29 U.S.C. §501(c).

The specific question which arises in this case is whether the indictment, with its allegation of embezzlement of funds through

no work,[6] was constructively amended by the proof at trial and the Court's instructions. Unquestionably, the trial evidence established that union-related services and activities had been performed by Anthony Hughes and George Argie[7] and that such duties fell under the job definition of a business agent as defined and described in the union constitution. Review of that particular question entails consideration of the larger issue of whether, when the expenditure of funds is authorized, proof of lack of benefit to the union is an essential element of embezzlement under 29 U.S.C. §501(c). That query has produced a conflict between, primarily, the Second Circuit and various of the other circuits which, although rejecting the Second Circuit's analysis, have not achieved consensus among themselves as to the elements of 29 U.S.C. §501(c). The issue has not been addressed by the Supreme Court and the case at bar, involving the interrelationship between 501(c) and the authorized expenditure of union salaries, presents a needed and fruitful area for guidance from this Court.

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[6] The indictment referred to the failure to perform work and to perform the services and duties of a business agent; hence, the defendants' argument that the indictment charged that the specified employees had done *no work*. Moreover, in its response to the motion for a bill of particulars, the Government stated a more formal response; that is, a bill of particulars *per se* was not necessary since the focus of the indictment was clearly that the specified employees had done *no work*. Since the main purpose of a bill of particulars is to refine the indictment in order to avoid prejudicial surprise at trial, defendants validly relied upon this statement as refining and clarifying the language of the indictment, thereby reinforcing the conclusion that the prosecutorial theory was one of "no work." *See, United States v. Smith*, 776 F.2d 1104, 1111 (3d Cir. 1985) (a bill of particulars, like the indictment, is designed to define and limit the Government's case. As with the indictment, there can be no variance between the notice given in the bill of particulars and evidence at trial).

[7] The jury acquitted the defendants of any embezzlement accusations made with regard to the salaries paid Allen Friedman and John Nardi.

A. Constructive Amendment of the Indictment.

In *United States v. Stirone*, 361 U.S. 212, 215-16 (1960), this Court held that once an indictment has been returned by the grand jury "its charges may not be broadened through amendment except by the grand jury itself." The basis of the rule is that the Fifth Amendment guarantees that a defendant may only be prosecuted for a felony upon indictment by a grand jury. Conviction on activities not charged in the indictment, including an impermissible broadening of the indictment, violates that constitutional safeguard.

The *Stirone* indictment charged a violation of the Hobbs Act, 18 U.S.C. §1951, specifying that Stirone had unlawfully obstructed the interstate movement of sand brought into Pennsylvania and used for the manufacture of steel. However, at trial, the Government was also permitted to introduce evidence of interference with steel shipments sent from the Pennsylvania steel plant into Michigan and Kentucky. The trial judge instructed the jury that it could base its determination on the interstate commerce aspect of the case by finding interference with either the sand or steel shipments. In reversing the conviction, this Court noted that there were two essential elements to a Hobbs Act violation, interference with commerce and extortion. The Court held that when the indictment charges that only one kind of commerce has been burdened, "a conviction must rest on that charge and not another, even though it be assumed that under an indictment drawn in general terms a conviction might rest upon a showing that commerce of one kind or another had been burdened." *Id.* at 218.

In the case at bar, the indictment was brought under 29 U.S.C. §501(c) which, in very broad terms, created a new federal crime of, in essence, larceny. The statute has generally been construed as covering almost any kind of a common law taking, whether by

larceny, theft, embezzlement, or conversion. *See, United States v. Harmon*, 339 F.2d 354, 357 (6th Cir. 1964), *cert. denied*, 380 U.S. 944 (1965). Moreover, the courts appear to be in agreement that the fiduciary duty imposed under §501 is broad, indeed. *See, United States v. Bane*, 583 F.2d 832 (6th Cir. 1978), *cert. denied*, 439 U.S. 1127 (1979).

Nevertheless, while the Labor Management Reporting and Disclosure Act (LMRDA) was enacted in order to rid unions of all manner of corrupt practices, its drafters were also concerned that its provisions not unduly interfere with the internal affairs of the union. *Finnegan v. Leu*, 456 U.S. 431 (1982). *See*, S. Rep. No. 187, 86th Cong., 1st Sess. 7 (1959) reprinted in 1 Legislative History at 403, U.S. Code Cong. and Admin. News 1959, p. 2323.

Given the inherent tension between forestalling union chicanery and deferring to the special problems besetting unions, defendants submit that the courts must be particularly alert to prosecutorial endeavors to enlarge the scope of the crime encompassed within §501(c). Therefore, as in *Stirone*, when a particular theory of how the alleged embezzlement has occurred is outlined, the Government must be held to proof of that theory, and not another which results in broadening the base of criminal liability.

There are three cases in particular which lend credence to, and illuminate, the defendants' argument. In *Smolar v. United States*, 557 F.2d 13 (1st Cir.), *cert. denied*, 434 U.S. 971 (1977), the indictment charged conspiracy and substantive violations of the federal securities laws. The count which pertained to the allegation of constructive amendment charged that the defendant had defrauded the shareholders of a mutual fund (the Technical Fund) by causing it to purchase stock having "little, if any" value. The proceeds of the sale were diverted to a separate entity (Limited) which the Government alleged the defendants were attempt-

ing to sustain at the cost of its only valuable asset — the Technical Fund.

At the close of the Government's case the defense moved for a judgment of acquittal, arguing that the Government had offered no evidence that the stock was essentially without value. The trial court denied the motion, holding that the defendants who, with fraudulent intent, diverted cash from the Technical Fund by buying the stock, could not be relieved of criminal liability because the stock actually had value. The Court of Appeals disagreed, holding that even if the trial court's position accurately described an offense under 15 U.S.C. §78(j):

> [I]t is a significantly different offense from the one charged in the indictment. Thus, we agree with appellant's contention that the instruction constituted a material and prejudicial variance from the charge in the indictment . . . . The Government asserts that it need not prove actual loss to investors in prosecuting fraudulent practices under Section 78(j) and Rule 10(b)-5 . . . [b]ut the court's instruction did not simply point out that a fraudulent scheme need not be a profitable one. *Rather, by eliminating the issue of value, the court materially changed the theory on which the scheme was alleged to be fraudulent.* The indictment charged a sale of worthless securities — as the Government put it at times during the trial, the "milking" of the Fund. The instruction, however, focuses on appellant Smolar's duty to act in the interest of the Fund, and states that the determinative issue is whether this was a "genuine transaction . . . in behalf of the fund." *The distinction between outright fraud as charged in the indictment and a breach of fiduciary duty cannot be dismissed as insignificant.* In this context, the allegation that the Logic warrants were "of little, if any value" was not merely a "useless averment", *it was the critical averment that made the scheme, as alleged, fraudulent.*

Smolar, 557 F.2d at 18 (emphasis added) (citations omitted).

The relationship of the case at bar to *Smolar* lies in the fact that even assuming, arguendo, that the Government could legally

prosecute a §501(c) embezzlement upon the theory that employees had been reimbursed at an unreasonable rate, or at a salary which far exceeded the value of their services (*see*, (B), *infra* at 17), the grand jury did not do so. Rather, the indictment the grand jury voted upon stated that the embezzlement was the payment of "no shows" or "ghost" employees: those who were paid but who did no work.

In essence, the indictment charged that union funds were purloined because they were expended without any benefit accruing to Locals 507 and 19. Defendants Friedman and Hughes entered the trial prepared to meet that theory by establishing that a benefit did redound to the union through actual services Argie and Hughes had performed. They were not, however, prepared to defend against an accusation that the benefit, the work, was too insubstantial to warrant the salary paid (a defense which would have necessitated expert witnesses who could address the value of certain kinds of union-related endeavors). As in *Smolar*, when the trial court charged the jury that an incidental benefit to the union would not defeat a fraudulent intent, it removed from the jury's purview the question of any objective benefit to the union, thus substantially broadening the issue as it had been framed in the indictment.

In *United States v. Varoz*, 740 F.2d 772 (10th Cir. 1984), the podiatrist defendant was indicted for submitting Medicare claims for payments for services and treatments "not rendered as described." *Id.* at 774. At trial, the proof established only that while some of the disputed operations and procedures may have been performed, they were unnecessarily repeated and/or useless. In reversing the convictions pertinent to such counts, the Tenth Circuit held that the indictment required the Government to prove that the defendant had not performed the services *at all*. "Whether services actually rendered were medically necessary was not an issue." *Id.* at 774.

Also pertinent to this issue of constructive amendment is *United States v. Marolda*, 615 F.2d 867 (9th Cir. 1980), a prosecution brought under 29 U.S.C. §501(c). There, the indictment charged the defendant with the embezzlement of union funds "without proper authorization and without benefit to said Local." *Id.* at 868, n.2. Although the Ninth Circuit indicated that, in a 501(c) case, the Government is not obliged to prove authorization and lack of benefit, once it has specifically inserted these elements into the indictment, it was required "to prove the offense as charged in the indictment." *Id.* at 870. Because the trial court's instructions had treated these averments as mere surplusage, the conviction was reversed:

> [T]he grand jury may have indicted Marolda only because the United States Attorney represented to it that the credit card expenditures were not actually authorized by or of benefit to the union. "[T]he settled rule in the federal court [is] that an indictment may not be amended except by resubmission to the grand jury, unless the charge is merely a matter of form." *Russell v. United States*, 369 U.S. 749, 770, 82 S.Ct. 1038, 1050, 8 L.Ed.2d 240 (1962). The change effectuated here by the jury instruction was no mere matter of form.

Id. at 870-71.

The Court went on to note that the variance in *Marolda* between indictment and proof was critical, given that a "major portion of [the defense] had been devoted to showing that [the] expenditures were properly authorized and served a union purpose." *Id.* at 871.

In *Smolar*, the First Circuit had recognized that even if the crime of fraud under 15 U.S.C. §78(j) and S.E.C. Rule 10(b)-5 did not necessitate proof of actual loss, once the Government asserted same in the indictment, and the trial court removed its consideration from the jury, the defendant was denied the due process of law when the Government was not held to proof of that

element. Similarly, in *Marolda*, even if proof of lack of benefit to the union was not deemed essential to establishing a 501(c) violation, once the Government specifically alleged that the credit card expenditures were of no benefit to the union, proof of that statement of fact was an essential element of the prosecution's theory of the case. The Ninth Circuit reversed the conviction, despite the fact that the trial judge, in his instructions to the jury, had advised it that there was no embezzlement if it concluded that the defendant, in good faith, believed that the expenditures were for the benefit of the union.

In Friedman and Hughes' prosecution, the trial court,[8] in ruling that there had been no constructive amendment or prejudicial variance, ignored the fact that the Government, in its response to the motion for a bill of particulars, had stated that the indictment charged that the four employees had done *no work*. Rather, it noted that under *United States v. Bane*, 583 F.2d 832, the essential elements of a 501(c) violation are[9] that the defendants, with the intention to defraud the union and without a good faith belief that the expenditures were for the legitimate benefit of the union, converted the union money to their own use. The Court reasoned that, even assuming that the wording of the indictment was equivalent to an absolute allegation of "no work," "such allegation did not pertain to an element of the charges and, as such, no constructive amendment occurred as a result of the presentation of certain trial evidence and instructions" (A30-A31).

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[8] In affirming the conviction, the Sixth Circuit relied upon the trial court's memoranda of May 13, 1988, June 21, 1988 and May 5, 1989 (A5 through A33).

[9] Excluding the undisputed elements that the accused is (1) an official or employee (2) of a labor organization (3) involved in interstate commerce and that (4) the funds belonged to the labor organization. *United States v. Bane*, 583 F.2d at 836, n.9.

Defendants submit first, that the language of the indictment did amount to an allegation of no work and that the inclusion of that allegation (which was also the crux of the Government's response to the motion for a bill of particulars: that no work had been performed) added, as in *Smolar* and *Marolda*, an essential element to the theory of embezzlement alleged. In effect, the Government argued, as it had in *Marolda*, that salaries had been paid but that no benefit, in the form of work, had reverted to the union as consideration for those expenditures.

Thus, the question of whether the Government should have been required to prove that no work had been performed is directly related to the question of whether the Government is required to prove lack of union benefit as an element of a §501(c) prosecution. Defendants Friedman and Hughes, throughout the prosecution of this case, have argued that it must, and that allegations that salaries were reimbursed at an unreasonable rate or, paid in exchange for an insubstantial amount of work, may assert a breach of fiduciary duty under 501(a) but cannot constitute criminal embezzlement under 501(c). Therefore, even if the indictment is not deemed amended, the conviction should be reversed, nonetheless, since the Government did not prove the essential elements of the crime.

B. Lack of Benefit to the Union is an Essential Element of 501(c).

The question of whether lack of benefit to the union is an essential element of the crime has caused ongoing conflict among the Circuits. The case at bar presents an appropriate vehicle for resolution of the matter by this Court since the Sixth Circuit, under whose jurisdiction the defendants were prosecuted, has adopted an expansive reading of the statute and since the issue reaches the outermost boundaries of due process when the lack of benefit controversy is raised in the context of salaries; i.e., where the defend-

ant does not (at least in the case of Harold Friedman) personally benefit from the alleged embezzlement.

In *United States v. Bane*, 583 F.2d 832, the Sixth Circuit held that, if the expenditure of funds was authorized, the prosecution can establish embezzlement by proof of the defendants' fraudulent intent and proof that he lacked a good faith belief that the expenditure in question benefitted the union.

The Second Circuit, however, in the seminal case of *United States v. Silverman*, 430 F.2d 106 (2d Cir. 1970), *cert. denied*, 402 U.S. 953 (1971), *modified on other grounds*, 439 F.2d 1198 (2d Cir. 1970), took a different position based on facts very similar to those herein. That Court interpreted §501(c) as requiring the Government to prove either a lack of *bona fide* authorization by the union for the expenditure in question or an absence of benefit to the union.

In *Silverman*, the president of two locals had been convicted of contributing union funds to a political campaign. The Second Circuit reversed the conviction because the Government had failed to show, either the absence of authorization or lack of benefit to the locals, since their constitutions contemplated monetary contributions to political candidates.

While, in *Bane*, the Sixth Circuit questioned whether the Second Circuit continues to take the position that the Government must prove an actual lack of benefit to the union, the cases it cited in support, *United States v. Ottley*, 509 F.2d 667 (2d Cir. 1975) and *United States v. Santiago*, 528 F.2d 1130 (2d Cir.), *cert. denied*, 425 U.S. 972 (1976), are unpersuasive. Neither required consideration of the element of lack of benefit *per se*.

In *Ottley*, the defense contention was that the instructions unfairly limited the issue of intent by addressing the issue solely in terms of whether the expenditure was authorized — without con-

sidering the defendant's belief that the expenditures had been authorized or might benefit the union. In that context, the Court said: "If Ottley in good faith believed that Byrne's automobile was being used for union business *and* that the union had authorized the expenditure or would ratify it, he did not violate section 501(c). Whether the expenditure did benefit the union would, of course, be relevant to Ottley's alleged *bona fide* belief that it did." *Id.* at 671 (emphasis in original).

United States v. Santiago, 528 F.2d 1130, concerned the defendant's travel expenses to locales such as the Virgin Islands. The defendant conceded that the expenditures were *personal* but argued that the Government's proof did not preclude the possibility that the union might subsequently ratify these expenditures. The Court held that the instructions, patterned after the test in *Ottley*, fairly reflected that concern in advising the jury to consider whether the defendant had a good faith belief that the funds were being used for union business and that the union had authorized them, or would.

Those cases, then, do not formulate the question evident in *Silverman* and the case at bar: whether, when funds are indisputably authorized and are expended as salaries which do not confer any benefit upon the defendant, the Government must be held to proof that the authorized expenditures did not benefit the union.

The conflict between the position of the Sixth Circuit and that of the Second, as espoused in *Silverman*, is not the sole area of disagreement among the courts of appeal as to the elements of §501(c). While the Fifth Circuit appears to have followed the reasoning of *Bane*, *see*, *United States v. Dixon*, 609 F.2d 827, 829 (5th Cir. 1980), the First Circuit, in *Colella v. United States*, 360 F.2d 792, 804 (1st Cir.), *cert. denied*, 385 U.S. 829 (1966), took a somewhat singular approach and approved a 501(c) jury charge which instructed the jury to acquit if the defendant's expenditures had been for a union purpose, albeit unauthorized. And, the Sev-

enth Circuit, in the relatively recent case of *United States v. Floyd*, 882 F.2d 235 (7th Cir. 1989), determined that, rather than require the Government to prove lack of authorization, union benefit or good faith belief therein, it would look at the totality of the circumstances in an effort to determine whether or not the Government had established fraudulent intent. *See also, United States v. Welch*, 728 F.2d 1113, 1116-18 (8th Cir. 1984); and *United States v. Thordarson*, 646 F.2d 1323 (9th Cir.), *cert. denied*, 454 U.S. 1055 (1981) (essential question is whether defendants possessed fraudulent intent).

Given this complex of opinions, defendants submit that the elements of 501(c) should be delineated by this Court and that it should do so in a case where, as Friedman and Hughes have attempted to stress, the facts of authorization and lack of personal gain to the defendant strike not at the merely parochial but raise essential concerns over the scope of the LMRDA and unionism, in general.

For instance, in the context of a fiduciary breach of duty under §501(a), the Seventh Circuit, in *McNamara v. Johnston*, 522 F.2d 1157 (7th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976), held that union officials could not be held liable for breach of fiduciary duty if they expended funds in accordance with the union's constitution:

> Congress looked to the union's constitution, by-laws, and resolutions to define a union officer's fiduciary responsibilities and that so long as an officer expends funds without personal gain in compliance with these standards, there is no breach of any duty imposed by §501.

Id. at 1163.

The Seventh Circuit was of the view, in *McNamara*, that §501 was intended to insure that union leaders were not *personally* benefiting from expenditures made. The statute was not enacted

for the purpose of rewriting a union's constitution or directing its internal affairs:

> Section 501's language and the legislative history of the Landrum-Griffin Act make it clear that Congress placed primary reliance on union rules and policies to establish the scope of a union representative's fiduciary obligations. The statute itself specifies that union officers act as fiduciaries not for each member but for the labor organization "as a group" and then charges that union officers must expend union money and property "in accordance with its constitution and by-laws and any resolutions of the governing bodies adopted thereunder".

Id. at 1163. *See also, Gabauer v. Woodcock*, 594 F.2d 662, 668 (8th Cir.), *cert. denied*, 444 U.S. 841 (1979) (following rule of *McNamara v. Johnston*: expenditures were clearly authorized by union's constitution and resolutions of the union's national convention; thus, no 501 civil violation).

Thus, if the union officer does not breach his 501 *civil* fiduciary responsibility when there is no personal gain to him and the funds are expended in accordance with the union constitution, he should be held to no greater responsibility under the *criminal* aspect of the statute when the expenditure is authorized, does not revert to the defendant's benefit and is arguably of benefit to the union. The position of the Seventh Circuit is most germane to this case where the defense was predicated upon the fact that the work which was performed by Argie and Hughes came within the duties of a business agent as defined by the union's constitution and by-laws and was no less beneficial because it did not comport, to some extent, with what other business agents did.

Equally appropriate to consideration of §501(c) is the frequently cited opinion of *Morrissey v. Curran*, 650 F.2d 1267 (2d Cir. 1981), which discussed the fiduciary standard of §501(a) in a case centered on the question of excessive compensation to union officers. The reasonableness of salaries, as well as severance and

vacation pay and expense allowances, had been challenged by union members in a §501(b) suit and the Court, cognizant of the need to protect the union membership while refraining from undue interference in union affairs, said:

> We thus adopt the view, consistent with the thrust of §501, that where a union officer *personally benefits from union funds*, a court in a §501(b) suit may determine whether the payment, notwithstanding its authorization, is so manifestly unreasonable as to evidence a breach of the fiduciary obligation imposed by §501(a).

Id. at 1274 (emphasis added).

The Court employed similar considerations in determining that the fiduciary standard to which union officials should be held must be a flexible one, depending upon the circumstances of each case. Thus, when a union officer personally benefits from an expenditure, the Court, in a §501(b) civil suit, may hold the officer to the strict standard of undivided loyalty due from a trustee. When the expenditure does not benefit the officer personally, however, the reasonableness of the salary is presumed since that expenditure is not self-interested and benefits the union in that it constitutes payment for services rendered.

The relevance of *Morrissey* to a consideration of the elements of §501(c) is apparent. If a union official's salary increase will be judged by a reasonableness standard when the officer is held to an accounting under §501(b), a more exacting standard should not be utilized to prove a criminal embezzlement. However, if the Government is not required to prove that *no work* was performed in consideration of the salaries paid; that is, that no benefit accrued to the union, then, in effect, it has been given authority to find criminal embezzlement on the basis of a salary expenditure which the Government or jury may find merely excessive.

In *Morrissey v. Curran*, 650 F.2d 1267, Judge Newman, speaking with regard to §§501(a) and (b) said that: "Section 501 does

not convert judges into paymasters for union officers." *Id.* at 1275. The same expression of concern is equally appropriate to this case and thus, the Court's review is sought so that the contours of §501(c) do not expand beyond the reach of criminal liability intended by Congress. *See, Morrissette v. United States*, 342 U.S. 246, 263 (1952).

POINT II

COUNTS I AND II SHOULD BE OVERTURNED BECAUSE THEY WERE OBTAINED UNDER A STATUTE THAT IS UNCONSTITUTIONALLY VAGUE BOTH ON ITS FACE AND AS APPLIED TO THE DEFENDANTS

In a recent decision, *H.J., Inc. v. Northwestern Bell Telephone Co.*, __U.S.__, 109 S.Ct. 2893 (1989), the Court held that, in order to establish a pattern of racketeering activity under 18 U.S.C. §1961(5), the prosecutor must prove something beyond the mere two acts required by the statute: "[T]he statement that a pattern 'requires at least' two predicates implies 'that while two acts are necessary, they may not be sufficient' (*Sedima, supra*, at 496, n.14, 105 S.Ct. at 3285, n.14)." *Id.* at 2899.

That elusive "something more" that can transform two acts of racketeering into the requisite pattern was said to be relationship plus continuity: "RICO's legislative history reveals Congress' intent that to prove a pattern of racketeering a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *Id.* at 2900.

Concurring only in the result, which reversed the affirmance of a motion to dismiss a civil RICO claim because it lacked an allegation of multiple schemes of racketeering, Justice Scalia, joined in by Chief Justice Rehnquist and Justices O'Connor and Kennedy, denounced the presumed clarification of pattern as unworkable and engendering more, rather than less, confusion. Concluding that the courts have failed mightily and repeatedly in their efforts to articulate a meaningful concept of pattern, Justice Scalia noted that the resulting confusion had "produced the widest and most persistent circuit split on an issue of federal law in recent memory." *Id.* at 2906-07.

Given the Court's evident dissatisfaction with its own efforts to provide guidance in interpreting the "pattern of racketeering" and the continuing morass of unaligned opinion among the lower courts as to what factual predicate will satisfy the concept of relationship plus continuity,[10], defendants posit that their convictions were obtained under a statute which is void for vagueness and that, in any case, the predicate acts of which they were found guilty do not satisfy the requisite of relationship plus continuity.

According to *Kolender v. Lawson*, 461 U.S. 352 (1983), the void for vagueness doctrine:

> requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Although the doctrine focuses both on actual notice to citizens, and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine — the requirement that a legislature establish minimal guidelines to govern law enforcement."

Id. at 357-58, *quoting*, *Smith v. Goguen*, 415 U.S. 566, 574 (1974) (citations omitted).

Because the doctrine recognized that it has a more fundamental purpose — workable guidelines for enforcement — than providing actual notice to the citizenry of what conduct is proscribed,

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[10] *Compare*, for instance, these cases regarding the sufficiency or insufficiency of the "continuity" element of pattern: *United States v. Indelicato*, 865 F.2d 1370 (2d Cir.), *cert. denied*, __U.S.__, 110 S.Ct. 56 (1989) (three simultaneous murders sufficient) *and United States v. Kaplan*, 886 F.2d 536 (2d Cir. 1989), *cert. denied*, __U.S.__, 110 S.Ct. 1127 (1990) (simultaneous bribe to two public officials sufficient) *with Airline Reporting Corp. v. Aero Voyagers, Inc.*, 721 F.Supp. 579 (S.D.N.Y. 1989) (13-month scheme insufficient) *and Menasco, Inc. v. Wasserman*, 886 F.2d 681 (4th Cir. 1989) (one-year scheme insufficient).

defendants submit that their claim should be reviewed essentially as a facial challenge to RICO, rather than merely as applied to them. That broader scope of review comports, not only with *Kolender* and *Smith*, but is also consistent with what those concurring justices in *H.J., Inc.* perceived as the pivotal RICO problem: the intractability of the "pattern" requirement.

However, even if viewed in a more limited context, the RICO convictions herein do not withstand constitutional scrutiny, particularly as applied to defendant Hughes, since the pattern acts of racketeering do not have the requisite aspect of continuity. Anthony Hughes was found guilty of conducting the affairs of an enterprise by committing two acts of embezzlement: (1) collecting a salary of $26,500 of the funds of Local 19 from January 1, 1978 through December 31, 1978, and (2) collecting a salary of $17,000 of the funds of Local 19 from May 16, 1981 through December 31, 1981. Defendant Friedman was found guilty of these same two predicates, as well as a third: payment of a salary in the amount of $8,800 to George Argie from the funds of Local 507 from January 1, 1979 until June 30, 1979.

The lapse in continuity between the predicate acts committed by defendant Hughes, a gap of three years, indicates that the crimes committed were sporadic and represent, at best, two acts occurring during a closed period of time. That there was no threat of repetition of the embezzlement is indicated through Hughes' statement, made on March 2, 1982, after the time period charged in the indictment, and introduced at trial through Government Agent James Thomas, that he was "going to go back and work for the union." (James Thomas at TR 1920). This apparent statement of cessation in criminal activity precludes a finding of continuity under *H.J., Inc.* since the acts do not "[project] into the future with the threat of repetition." *H.J., Inc.*, 109 S.Ct. at 2902.

The same infirmity applies to Friedman's conviction on three predicate acts: those discussed above and the salary payments to

George Argie in 1979. The predicates, rather than constituting a pattern, are three distinct acts of embezzlement, separated by years in between and the continuance of regular and legitimate union business.

Review of the RICO constitutionality claim is merited in this particular case centered, as it is, on 29 U.S.C. §501(c). The vagueness of the RICO statute, both in terms of notice of the conduct proscribed and the establishment of minimum guidelines for law enforcement, must be viewed in conjunction with the questions raised regarding the applicability of §501(c) to authorized salary expenditures. The Supreme Court's obvious concern that the pattern of racketeering activity not encompass sporadic behavior which does not pose a threat of repetition, takes on an even more urgent aspect when the predicate acts concern the authorized expenditure of union funds disbursed for employee salaries. This case thus presents an apt occasion for further review of the vagaries of the RICO legislation.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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